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## NATIONAL SECURITY VEILED IN SECRECY: AN ANALYSIS OF THE STATE SECRETS PRIVILEGE IN NATIONAL SECURITY AGENCY WIRETAPPING LITIGATION

MAJOR KRISTIAN W. MURRAY\*

*To cover with the veil of secrecy the common routine of  
business, is an abomination in the eyes of every  
intelligent man and every friend to his country.<sup>1</sup>*

*Five years after our nation was attacked, the terrorist  
danger remains. We're a nation at war—and America  
and her allies are fighting this war with relentless  
determination across the world. Together with our  
coalition partners, we've removed terrorist sanctuaries,  
disrupted their finances, killed and captured key*

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\* Judge Advocate, U.S. Army. Presently assigned as Chief, Admin. Law, U.S. Army Central Command, Operational Command Post, Kuwait. LL.M., 2008, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.; J.D. (*cum laude*), 1998, Gonzaga Sch. of Law, Spokane, Wash.; B.A., 1995, Univ. of Mont., Missoula, Mont. Previous assignments include Command Judge Advocate, 501st Military Intelligence Brigade, S. Korea, 2005–2007; Senior Trial Counsel, Eighth U.S. Army, Yongsan Garrison, S. Korea, 2004–2005; Special Projects Officer, 75th Legal Support Organization, Moffett Field, Cal., 2003–2004; Defense Language Institute & Foreign Language Center, Presidio of Monterey, Cal., 2001–2003 (Chief, Admin. Law 2002–2003; Chief, Mil. Justice, 2001); 19th Theater Support Command, Taegu, S. Korea, 1999–2001 (Trial Counsel, 2000–2001; Chief, Client Servs., 1999–2000). Member of the bar of the State of Washington. The author would like to thank Major (MAJ) Sean Condron, MAJ Shawn Fast, MAJ Gene Etlinger, and Mr. Sam Flood for their input and insight into this body of work. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course.

<sup>1</sup> Reynolds v. United States, 192 F.2d 987, 995 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (quoting 3 PATRICK HENRY, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 170 (J. Elliot ed., 1836)).

*operatives, broken up terrorist cells in America and other nations, and stopped new attacks before they're carried out. We're on the offense against the terrorists on every battlefield—and we'll accept nothing less than complete victory. In the five years since our nation was attacked, we've also learned a great deal about the enemy we face in this war. We've learned about them through videos and audio recordings, and letters and statements they've posted on websites. We've learned about them from captured enemy documents that the terrorists have never meant for us to see. Together, these documents and statements have given us clear insight into the mind of our enemies—their ideology, their ambitions, and their strategy to defeat us.<sup>2</sup>*

## I. Introduction

In December 2005, the *New York Times* reported that President Bush issued a classified Executive Order shortly after 11 September 2001, allowing for the telephonic eavesdropping and e-mail interception of American citizens' domestic communications without federal court authorization.<sup>3</sup> The newspaper reported the purpose of the surveillance program was to intercept communications between U.S. citizens and Al Qaeda operatives to thwart and mitigate future terrorist attacks.<sup>4</sup> The next day President Bush confirmed that the Executive operated a “terrorist surveillance program,” stating:

In the weeks following the terrorist attacks on our Nation, I authorized the National Security Agency consistent with US law and the Constitution, to intercept the international communication of people with known Al Qaeda and related terrorist organizations. Before we intercept these communications, the Government must

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<sup>2</sup> Press Release, White House, President Discusses Global War on Terrorism, Address at the Capital Hilton Hotel, Wash., D.C. (Sept. 5, 2006).

<sup>3</sup> James Risen & Eric Lichtlau, *Bush Lets US Spy on Caller Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>4</sup> *Id.*

have information that establishes a clear link to these terrorist networks.<sup>5</sup>

Following the disclosure of this surveillance program, aggrieved private citizen plaintiffs and the American Civil Liberties Union (ACLU) initiated several lawsuits against the alleged transgressing telecommunication carriers and the National Security Agency (NSA).<sup>6</sup> Additionally, disclosure of the program caused considerable congressional debate as to the justification and need for a government surveillance program that may encroach on American citizens' constitutionally protected rights.<sup>7</sup> The Government's response to these actions has been twofold. In the litigation forum, the Government has invoked the state secrets privilege in an attempt to dismiss the suits via summary judgment.<sup>8</sup> In the public policy venue, and indirectly through an Attorney General opinion,<sup>9</sup> the Government has argued that the terrorist surveillance program falls broadly within the President's Article II constitutional powers<sup>10</sup> or statutory authority.<sup>11</sup>

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<sup>5</sup> See President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880 (Dec. 17, 2005) [hereinafter President's Radio Address].

<sup>6</sup> *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006) (denying the Government's motion to dismiss a challenge to the National Security Agency's warrantless wiretapping program on state secrets grounds); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468) (district court denying Government's motion to dismiss regarding NSA terrorist surveillance program); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006) (granting the Government's motion to dismiss a challenge to the NSA's warrantless wiretapping program on state secrets grounds); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (denying the Government's motion to dismiss a challenge to the NSA's warrantless wiretapping program on state secrets grounds).

<sup>7</sup> *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of U.S. Attorney Gen. Alberto Gonzales).

<sup>8</sup> See, e.g., *ACLU*, 438 F. Supp. 2d at 979; *Hepting*, 439 F. Supp. 2d at 758–59.

<sup>9</sup> Letter from Assistant Attorney Gen. William E. Moschella, to Chairman Charles P. Roberts & Vice Chairman John D. Rockefeller of the Senate Select Comm. on Intelligence & Chairman Peter Hoekstra and Ranking Minority Member Jane Harman of the House Permanent Select Comm. on Intelligence (Dec. 22, 2005) (setting forth in general terms the Bush Administration's position regarding legal authority supporting NSA activity).

<sup>10</sup> U.S. CONST. art. II, § 2.

<sup>11</sup> Authorization for Use of Military Force, Act of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224. Section 2 provides, in relevant part, that

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines

This article will focus on the Government's assertion that the common law doctrine known as the state secrets privilege bars further litigation regarding the NSA's electronic surveillance program. In doing so, this article will examine the competing interests involved. Namely, this article examines the Government's interest in preventing in-court disclosure of information that may compromise the sources and methods of its foreign intelligence gathering. This interest is weighed against the American public's need for transparency and assurances that the Government is not inexcusably encroaching on individual constitutional rights.

The federal government, from President Jefferson's administration to the present date, has utilized the state secrets privilege or a form of the privilege in judicial proceedings.<sup>12</sup> However, since the seminal case of *United States v. Reynolds*<sup>13</sup> in 1953, the Government has more frequently invoked the privilege in high profile litigation.<sup>14</sup> The breadth, scope, and use of the privilege have become extremely relevant in the United States' Global War on Terrorism (GWOT).

The United States is facing an enemy in Al Qaeda that does not belong to a nation-state, does not utilize traditional methods in conducting its operations, and does not distinguish between civilian and military targets.<sup>15</sup> These factors have motivated the Executive Branch to

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planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

*Id.*

<sup>12</sup> *ACLU v. NSA*, 493 F.3d 644, 676 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

<sup>13</sup> *United States v. Reynolds*, 345 U.S. 1 (1953). In *Reynolds*, the Supreme Court first explicitly recognized the state secrets privilege and the steps that must be satisfied for the Government to invoke the privilege. *Id.* at 7-8.

<sup>14</sup> See, e.g., *Hepting v. AT&T, Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

<sup>15</sup> See William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 *MISS. L.J.* 639, 673-74 (2004) ("United States armed forces . . . are distinctly disadvantaged by a grossly asymmetrical legal framework in which morally inferior warriors enjoy all its protections but respect none of its obligations."); see also John Yoo, *Using Force*, 71 *U. CHI. L. REV.* 729 (2004).

The easier availability of weapons technology, the emergence of rogue states, and the rise of international terrorism have presented more immediate threats to national security than those from attack by

broaden its “inherent” Article II powers in an effort to better prosecute the GWOT. In this environment, the Bush Administration advocated using the state secrets privilege to keep government-sponsored operations secret from public scrutiny in the judicial forum.<sup>16</sup> On the other hand, some American citizens and policy groups argue that the Government is trampling on their rights to privacy and freedom of speech in the name of secrecy.<sup>17</sup> Consequently, the invocation of the state secrets privilege in NSA wiretapping litigation<sup>18</sup> and in cases of alleged Government rendition<sup>19</sup> has caused, and will continue to cause, significant and controversial discourse in academic and public policy forums.<sup>20</sup>

This article analyzes the state secrets privilege in NSA wiretapping litigation in three parts. Part I of this article will focus on the origin and development of the state secrets privilege as the Government’s primary argument to bar litigation during judicial cases where national security interests could be at risk.

Part II of this article will address the state secrets privilege in the context of current litigation involving the NSA’s warrantless wiretapping of communications of suspected terrorists. In this part, this article will examine the competing public policy needs at stake in the state secrets

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other nation-states. . . . [T]hese different developments mean that an attack can occur without warning, because its preparation has been covert and it can be launched by terrorists hiding within the civilian population.

*Id.* at 749–50.

<sup>16</sup> Press Release, White House, Press Briefing from Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at <http://www.globalsecurity.org/intell/library/news/2005/intell-051219-dni0.htm>.

<sup>17</sup> See, e.g., *ACLU v. NSA*, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006), vacated, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), petition for cert. denied, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

<sup>18</sup> E.g., *Hepting*, 439 F. Supp. 2d 974.

<sup>19</sup> E.g., *El-Masri*, 437 F. Supp. 2d 530.

<sup>20</sup> See, e.g., Jared Perkins, *The State Secrets Privilege and the Abdication of Oversight*, 21 *BYU J. PUB. L.* 235, 238 (2007) (“As currently applied, [the state secrets privilege] is a formidable obstacle to civil litigation against the government, an evisceration of the ability of a citizen injured by such executive acts to seek redress, oversee government actions, and hold officials accountable for bad policy or violations of the law.”). Academic discussion of the privilege has also focused on its effect on individual rights and judicial power. See, e.g., William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 *POL. SCI. Q.* 85, 90 (2005).

paradigm; namely, whether the state secrets privilege, as currently construed, prevents courts from adjudicating certain grievous constitutional claims in the name of national security.

Part III of this article will argue for continued judicial deference to the Executive in its implementation of secret surveillance programs. This section will advocate that the federal courts are not in the best position, nor were they originally constructed, to adjudicate national security matters effectively. However, this article contends that the blanket assertion of the state secrets privilege by the Executive, without any other form of oversight, can be problematic. A misused state secrets privilege potentially permits the Executive to encroach on constitutional protections in the name of security that may not be in the best long-term interest of the nation. To counter this potential for misuse and to fill this void of lack of oversight, this article argues for further congressional involvement through an Executive briefing and review system run by the intelligence committees in Congress. Alternatively, this article proposes that Congress enact a special national security court reporting directly to the congressional intelligence committees where the Executive would certify its secret surveillance operations. This article contends that both courses of action could be accomplished by enacting relatively minor changes in current intelligence oversight laws.

## II. History of the State Secrets Privilege

The state secrets privilege involves an assertion by the Executive Branch that disclosure of certain sensitive government information in a public venue could undermine the national security of the United States.<sup>21</sup> Accordingly, the privilege prevents disclosure of material that could cause “impairment of the nation’s defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.”<sup>22</sup> The privilege is not an ordinary evidentiary rule such as the patient-doctor privilege; rather, its invocation often has constitutional separation of powers implications.<sup>23</sup> The state secrets privilege is a common law evidentiary rule that first

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<sup>21</sup> *United States v. Reynolds*, 345 U.S. 1, 6 (1953).

<sup>22</sup> *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

<sup>23</sup> *ACLU v. NSA*, 438 F. Supp. 2d 754, 759 (E.D. Mich. 2006), *vacated*, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

surfaced in American jurisprudence in the early 1800s,<sup>24</sup> but has its roots in English common law.<sup>25</sup> The following are some of the primary cases that form the genesis of the privilege.

#### A. Proceedings Against Bishop Atterbury

*Atterbury* involved the consideration of an appropriate penalty against Bishop Atterbury on charges of treason and sedition in England in 1723.<sup>26</sup> The English Parliament was the forum for state trials during this time period.<sup>27</sup> To defend himself against the charge of treason, Bishop Atterbury wanted to examine cryptographers who had decoded letters that he had previously sent containing allegedly treasonous information.<sup>28</sup> Bishop Atterbury wanted to question the cryptographers on the methods and means by which they conducted their activities. However, the House of Lords denied Bishop Atterbury's request for relief because they believed such testimony could jeopardize England's security and potentially be advantageous to England's enemies.<sup>29</sup> This ruling by the English Parliament represented the first formal recognition of a national security-type privilege in a quasi-judicial forum under the English common law.

#### B. *United States v. Burr*

In *United States v. Burr*, John Marshall, sitting as a justice on the circuit court, first heard arguments regarding the release of confidential government information at the treason trial of Aaron Burr.<sup>30</sup> During the trial, Burr's counsel requested that the court subpoena President Jefferson to release a potentially inculpatory document regarding Burr's actions.<sup>31</sup> In response, the Government argued for non-disclosure of the

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<sup>24</sup> *U.S. v. Burr*, 25 F. Cas. 30 (U.S. Court of Appeals 1807).

<sup>25</sup> Transcript of Trial at 495–96, *Proceedings Against Bishop Atterbury*, 1723, 9 Geo. 1 (Eng.), reprinted in DAVID JARDINE, A COMPLETE COLLECTION OF STATE TRIALS 495–96 (T.B. Howell ed., 2000).

<sup>26</sup> EVELINE CRUICKSHANKS & HOWARD ERSKINE-HILL, *THE ATTERBURY PLOT* 204–09 (2004).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 208.

<sup>29</sup> *Id.*

<sup>30</sup> *U.S. v. Burr*, 25 F. Cas. 30, 32 (U.S. Court of Appeals 1807).

<sup>31</sup> *Id.*

matter, claiming that it contained sensitive information.<sup>32</sup> According to Chief Justice Marshall, the President did not have to produce some of the requested information, but the court would be very reluctant to deny production of other documents if they were essential to Burr's defense.<sup>33</sup> Although the court issued the subpoena, it held that if the subpoenaed documents contained any information that the Executive believed to be improper to disclose, and that was not immediately material to Burr's defense, the information would be suppressed.<sup>34</sup> Importantly, Chief Justice Marshall also observed that the Government in this instance was not resisting compliance with the subpoena by arguing that the disclosure of the document would endanger the public safety.<sup>35</sup>

### C. *Totten v. United States*

Not surprisingly, based upon the relative lack of American involvement in foreign conflicts or diplomacy during the nineteenth and early twentieth centuries, there were only limited times where the Executive invoked any form of privilege pertaining to military or state secrets.<sup>36</sup> However, one important precedent to come from the period was the case of *Totten v. United States*.<sup>37</sup> *Totten* involved the administrator of an estate of a former Union spy suing the Government on a breach of contract claim to recover money for the spy's covert activities during the Civil War.<sup>38</sup> By a unanimous vote, the Supreme Court dismissed the lawsuit on public policy grounds, holding that this type of trial could potentially disclose information regarded as confidential.<sup>39</sup> The Court stated a contrary result would run the risk of exposing "the details of dealings with individuals and officers . . . to the serious detriment of the public."<sup>40</sup>

Thus, *Totten* was the first time the U.S. Supreme Court explicitly precluded disclosure of Government-held information on security-related grounds. Given the context of the times, it is easy to understand how

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<sup>32</sup> *Id.* at 34.

<sup>33</sup> *Id.* at 37.

<sup>34</sup> *Id.* at 37–38.

<sup>35</sup> *Id.* at 31–33.

<sup>36</sup> ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 329–39 (1973).

<sup>37</sup> *Totten v. United States*, 92 U.S. 105 (1876).

<sup>38</sup> *Id.* at 106.

<sup>39</sup> *Id.* at 107.

<sup>40</sup> *Id.* at 106–07.



disclosure of this government information could have endangered the lives of former Northern sympathizers and further hampered the reconstruction relationship between the federal government and the former Confederate states. Notably, the Court did not analyze the case under a separation of powers or other constitutional argument rubric. Rather, the Court underscored the detrimental public policy ramifications of permitting lawsuits regarding unacknowledged espionage contracts to proceed.<sup>41</sup> Accordingly, the *Totten* holding strengthened the Executive Branch's argument for barring future litigation in national security cases where any type of covert contractual relationship existed between the Government and another individual or entity.

#### D. From *Totten* Through World War II

During World War II, the United States found itself in a military struggle against global fascism. During this time, the government increased the amount of classified information based upon its need to produce secret weapon systems, execute greater clandestine military operations, and gather more intelligence on foreign threats.<sup>42</sup>

In this environment, a case arose regarding disclosure of sensitive information in the civil/contractual context.<sup>43</sup> In *United States v. Haugen*, the Government prosecuted defendant Haugen for fraud by billing food services he did not render during the construction of the Manhattan Project.<sup>44</sup> The case required evidence of a contract between the Government and the food service provider.<sup>45</sup> However, the Government refused to provide the contract to the defendant, stating it contained secret information.<sup>46</sup> The district court ruled in favor of the Government, holding that

[t]he right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable. . . . The determination of what steps are necessary in time of war for the

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<sup>41</sup> *Id.* at 105–07.

<sup>42</sup> Schlesinger, *supra* note 36, at 107–19.

<sup>43</sup> *United States v. Haugen*, 58 F. Supp. 436 (E.D. Wash. 1944), *aff'd*, 153 F.2d 850, 853 (9th Cir. 1946).

<sup>44</sup> *Id.* at 437–40.

<sup>45</sup> *Id.* at 438.

<sup>46</sup> *Id.* at 437–38.

protection of national security lies exclusively with the military and is not subject to court review.<sup>47</sup>

Notably, the *Haugen* court narrowed its holding to the military's refusal to disclose information during a time of war for national defense purposes. The court did not explicitly recognize a broad Executive mandate to withhold confidential information through invocation of a state secrets privilege.<sup>48</sup>

#### E. *United States v. Reynolds*

After World War II, the United States became a global superpower and principal adversary of the former Soviet Union. The government established the NSA and the Central Intelligence Agency (CIA) to gather intelligence on communist nations. In this environment of heightened security concerns, the Supreme Court first formally recognized the state secrets privilege and provided the analytical framework for its modern day implementation in the seminal case of *United States v. Reynolds*.<sup>49</sup>

*Reynolds* involved a claim against the Government under the Federal Torts Claim Act (FTCA) brought by the widows of three civilians killed in a B-29 military airplane crash.<sup>50</sup> During pre-trial discovery, the plaintiffs requested information from the Air Force's flight accident report as well as statements from crewmen who survived the crash.<sup>51</sup> The Government objected to the release of this report, stating that the requested information contained military secrets that if released could compromise national security.<sup>52</sup> Further, the Government argued that Air Force regulations made the information privileged.<sup>53</sup>

In support of the Government's position, the Secretary of the Air Force filed an affidavit with the court asserting that the accident report was privileged in that "the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air

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<sup>47</sup> *Id.* at 438 (citing *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912); *United States v. Kiyoshi Hirabayashi*, 320 U.S. 81, 93 (1943)).

<sup>48</sup> *Id.* at 438-39.

<sup>49</sup> *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>50</sup> *Id.* at 2-3.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 3.

<sup>53</sup> *Id.* at 4-5.

Force.”<sup>54</sup> An affidavit from the Judge Advocate General of the Air Force reiterated that releasing the requested information “would seriously hamper national security, flying safety and the development of highly technical and secret military equipment.”<sup>55</sup>

The district court ordered the Government to provide it with the accident report for an in camera review to ascertain whether the information was privileged.<sup>56</sup> The Government would not turn over the requested accident report. Accordingly, the court entered judgment for the plaintiffs, finding that the FTCA divested the federal government of sovereign immunity.<sup>57</sup> Further, the court held that Air Force regulations creating a privilege to withhold information did not overcome express congressional authorization waiving sovereign immunity in the FTCA.<sup>58</sup> The Government appealed the decision and lost in the Third Circuit.<sup>59</sup> Subsequently, the Supreme Court granted certiorari to decide whether the Government properly invoked the state secrets privilege in its noncompliance with discovery.<sup>60</sup>

The Supreme Court recognized that strict discovery under the FTCA could expose military secrets. Thus, the Court held that in enacting the FTCA, Congress did not waive the common law state secrets privilege.<sup>61</sup> The Court held there was a reasonable possibility that introduction of the accident report would introduce state secrets. Consequently, the Court overruled the lower court and held that the Government properly invoked the state secrets privilege.<sup>62</sup>

In formulating its holding, the Court reasoned that the Federal Rules of Civil Procedure, which govern discovery under the FTCA, recognize that privileged information can be exempt from discovery.<sup>63</sup> Thus, the Court reasoned that Congress did not expressly waive the state secrets

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<sup>54</sup> *Id.* at 4.

<sup>55</sup> *Id.* at 4–5.

<sup>56</sup> *Reynolds v. United States*, 192 F.2d 987, 990–91 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 998.

<sup>60</sup> *Reynolds*, 345 U.S. at 2.

<sup>61</sup> *Id.* at 7.

<sup>62</sup> *Id.* at 11.

<sup>63</sup> *Id.* at 6–7.

privilege in implementing the FTCA.<sup>64</sup> The Court then turned to analyzing and clarifying the state secrets privilege, laying out the procedural grounds for its invocation:

The privilege belongs to the Government and must be asserted by it . . . . It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.<sup>65</sup>

The Court held that in order to uphold the invocation of the state secrets privilege, a court must find under the facts of the case that there is “a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”<sup>66</sup> However, the Court cautioned that the judiciary must conduct a balancing test to determine the validity of the privilege, stating, “Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”<sup>67</sup>

Thus, under *Reynolds*, courts should rule in favor of excluding evidence under the state secrets privilege when the need for such evidence is outweighed by the Government’s need to protect national security. In some cases, invoking the privilege will hinder a plaintiff’s ability to prevail at trial. In other instances, if the plaintiff cannot prove a prima facie case without the privileged evidence, the case may be dismissed. At any rate, the *Reynolds* case strengthens the principle that courts should be careful in cases where the “very subject matter of the action” presents a danger to national security if exposed in a judicial forum.<sup>68</sup>

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<sup>64</sup> *Id.* at 6–8 (noting that claims under the FTCA would still follow the Federal Rules of Civil Procedure, which recognize privileges during the discovery process).

<sup>65</sup> *Id.* at 7–8.

<sup>66</sup> *Id.* at 10.

<sup>67</sup> *Id.* at 11.

<sup>68</sup> *Id.* n.26 (citing *Totten v. United States*, 92 U.S. 105 (1876)).

F. *Halkin v. Helms*

The next significant case in the state secrets arena was the 1978 decision in *Halkin v. Helms*.<sup>69</sup> *Halkin* involved a suit brought by former Vietnam protesters and civil rights organizations against the NSA, CIA, and several telecommunications companies asserting constitutional and statutory violations arising out of the Government's alleged warrantless surveillance activities.<sup>70</sup> This litigation has obvious factual parallels to the current government terrorist surveillance program litigation in *Hepting v. AT&T*<sup>71</sup> and *ACLU v. NSA*.<sup>72</sup>

*Halkin* involved two specific NSA programs: *Operation Minaret* and *Operation Shamrock*. The *Minaret* program targeted overseas electronic communications, while the *Shamrock* program targeted overseas telegraphic communications.<sup>73</sup> Congressional hearings had leaked and disclosed some information regarding the *Shamrock* program, but not the *Minaret* program.<sup>74</sup>

After the plaintiffs brought suit, the Government immediately invoked the state secrets privilege, arguing for a dismissal. The Government asserted that further litigation would illustrate which specific electronic communications the NSA was monitoring.<sup>75</sup> Additionally, the Government asserted that litigation would expose the operating procedures the NSA used to monitor such communications.<sup>76</sup>

For the *Minaret* program, the district court sided with the Government, dismissing the complaint on the grounds that the Government could not confirm nor deny its surveillance activities without exposing state secrets.<sup>77</sup> However, the court ruled there had been sufficient public disclosures regarding the *Shamrock* program to invalidate the state secrets privilege; as such, any further disclosures in a

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<sup>69</sup> *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978).

<sup>70</sup> *Id.* at 3–5.

<sup>71</sup> *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

<sup>72</sup> *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, *ACLU v. NSA*, 438 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

<sup>73</sup> *Halkin*, 598 F.2d at 4.

<sup>74</sup> *Id.* at 4–5.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 3–4.

<sup>77</sup> *Id.* at 5.

judicial forum would not pose a threat to the NSA mission.<sup>78</sup> Both the plaintiffs and the Government appealed the district court's ruling.<sup>79</sup>

The District of Columbia (D.C.) Circuit Court affirmed the district court's dismissal of the suit regarding the *Minaret* program.<sup>80</sup> The D.C. Circuit then reversed the lower court's holding on the *Shamrock* program. Specifically, the circuit court found "[t]here is a 'reasonable danger' that confirmation or denial that a particular plaintiff's communications have been acquired would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst."<sup>81</sup>

In denying plaintiff's further discovery, the court opined that any Government answer regarding its foreign surveillance activities could jeopardize national security.<sup>82</sup> The court noted that even seemingly trivial matters can be privileged if they are part of a "mosaic . . . that can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate."<sup>83</sup> The court reasoned that even though there had been disclosure of certain portions of the *Shamrock* program, there had not been disclosure of particular targeting methods and target selection.<sup>84</sup> The court stated that disclosure of this information could provide information about NSA surveillance procedures to a sophisticated foreign intelligence analyst.<sup>85</sup> The court then reiterated that the Executive, not the Judiciary, is responsible for foreign intelligence oversight, noting that "courts, of course, are ill-equipped to become

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 9–10.

<sup>81</sup> *Id.* at 10 (citing *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 9.

The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.

*Id.*

<sup>84</sup> *Id.* at 10.

<sup>85</sup> *Id.* at 8, 10 (noting disclosure of information could illustrate how the Government conducts surveillance, which communications the Government surveilled, who might be considered a target of interest, and many other adverse inferences).

sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in this area.”<sup>86</sup>

Finally, the court held that it did not make a difference that the plaintiffs were alleging the Government’s underlying conduct was unlawful, because when the Government invokes the state secrets privilege, and a plaintiff is unable to present a prima facie case without the privileged evidence, it completely bars the underlying litigation.<sup>87</sup> Accordingly, the panel reversed the district court’s holding as to *Shamrock*, and remanded for dismissal the portion of the suit pertaining to the NSA.<sup>88</sup>

#### G. *Halkin v. Helms II*

On remand, the district court dismissed the primary cause of action against the NSA.<sup>89</sup> The plaintiffs’ remaining portion of their suit was a claim alleging the CIA submitted “watchlists” to the NSA “on a presumption that the submission of a name resulted in interception of the named person’s communications.”<sup>90</sup> The CIA produced some of the requested discovery. However, the Agency utilized the state secrets privilege regarding key documents that would have illustrated whether or not plaintiffs had standing. Because of this, the district court dismissed this final portion of the suit on summary judgment, upholding the Government’s claim of privilege. The plaintiffs appealed to the D.C. Circuit Court once again.<sup>91</sup>

The D.C. Circuit affirmed the lower court’s ruling dismissing the remaining claim against the CIA.<sup>92</sup> The D.C. Circuit held that the plaintiffs did not have standing based upon its previous holding in *Halkin* that the Government could neither confirm nor deny that it monitored the plaintiffs’ communications. Thus, because the targeting information was privileged, there was no way to ascertain if plaintiffs’ being placed on

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<sup>86</sup> *Id.* at 9.

<sup>87</sup> *Id.* at 7 (“[t]he state secrets privilege is absolute” and overrides any other competing interest, no matter how compelling).

<sup>88</sup> *Id.* at 12.

<sup>89</sup> *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 980 (D.C. Cir. 1983).

<sup>90</sup> *Id.* at 981–84.

<sup>91</sup> *Id.* at 988.

<sup>92</sup> *Id.*

CIA watchlists ultimately led to NSA monitoring.<sup>93</sup> The D.C. Circuit Court's holding again demonstrated its interpretation of the state secrets privilege bar as absolute. The plaintiffs could not demonstrate standing, because they could not show injury in fact without the very evidence protected by the privilege.<sup>94</sup>

Finally, the court rejected the plaintiffs' argument that the state secrets privilege should follow some of the procedures under the Freedom of Information Act (FOIA) outlined in *Vaughn v. Rosen*.<sup>95</sup> Under *Vaughn*, when the Executive refuses to disclose information under FOIA, it must submit a detailed explanation of the reasons for its non-disclosure.<sup>96</sup> The plaintiffs requested that the Government justify its withholding of information in state secrets cases utilizing the same FOIA-type "Vaughn index."<sup>97</sup> The D.C. Circuit stated this analogy was flawed. The court stated that the information the Government would not disclose was determined by the head of an Executive agency to have the potential to harm national security; thus, a more detailed explanation of the non-disclosed information would counter the very purpose of the state secrets privilege.<sup>98</sup>

Both *Halkin* and *Halkin II* demonstrate the power of the state secrets privilege. When the Government properly invokes the privilege, the plaintiffs might not be able to discover the very evidence that would give them standing. Without standing, plaintiffs may not proceed to a case on the merits, even if the case involves egregious constitutional violations. In *Halkin* and *Halkin II*, the D.C. Circuit demonstrated complete judicial deference to the Executive in national security matters. The court interpreted the state secrets privilege under *Reynolds* as allowing the Executive to claim secrecy, even without the court making any independent judgment on the appropriateness of invoking the privilege.<sup>99</sup>

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<sup>93</sup> *Id.* at 999. The court held that Government surveillance must be unlawful for a plaintiff to sustain a claim. Thus, for the CIA's submission of the plaintiffs' names to the NSA to constitute a claim, the plaintiffs must show that submission would lead to an unlawful search, not merely the probability of surveillance alone. *Id.*

<sup>94</sup> *Id.* at 998 (noting that the state secrets inquiry "is not a balancing of ultimate interests at stake in the litigation" but rather, "whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case").

<sup>95</sup> *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

<sup>96</sup> *Halkin II*, 690 F.2d at 995-96.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 996.

<sup>99</sup> *See Halkin v. Helms*, 598 F.2d 1, 7, 10 (D.C. Cir. 1978); *Halkin II*, 690 F.2d at 998-99.



The D.C. Circuit summarized its position on the matter by stating that “courts should accord the utmost deference to executive assertions of privilege upon grounds of military or diplomatic secrets.”<sup>100</sup>

H. *Ellsberg v. Mitchell*

In *Ellsberg v. Mitchell*, the D.C. Circuit Court again addressed the state secrets privilege in a lawsuit involving Government electronic surveillance.<sup>101</sup> *Ellsberg* involved former criminal defendants and their attorneys in the “Pentagon Papers” prosecution.<sup>102</sup> These individuals initiated a civil suit, alleging that “one or more of them had been the subject of warrantless electronic surveillance by the federal government” during the earlier criminal investigation.<sup>103</sup> The Government invoked the state secrets privilege pertaining to its alleged foreign electronic surveillance of the plaintiffs. The district court dismissed the plaintiffs’ claim, finding that the Government properly asserted the privilege. The plaintiffs appealed to the D.C. Circuit Court.<sup>104</sup>

On appeal, the D.C. Circuit stated that “whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.”<sup>105</sup> However, the court affirmed the district court’s ruling upholding the state secrets privilege. In doing so, it applied the *Halkin* analysis holding that there was a “reasonable danger” a sophisticated foreign intelligence analyst could discover information through the judicial proceeding regarding the Government’s electronic surveillance and collection techniques, which could ultimately undermine national security.<sup>106</sup> The court also reiterated the absolute binding nature and judicial deference of the state secrets privilege by stating that,

When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be

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<sup>100</sup> *Halkin*, 598 F.2d at 9 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

<sup>101</sup> *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983).

<sup>102</sup> *N.Y. Times v. United States*, 403 U.S. 713 (1973). Here the Government sought an injunction to prevent the publication of the contents of a classified study entitled *History of U.S. Decision-Making Process on Viet Nam Policy*. *Id.* at 714.

<sup>103</sup> *Ellsberg*, 709 F.2d at 52.

<sup>104</sup> *Id.* at 54.

<sup>105</sup> *Id.* at 57.

<sup>106</sup> *Id.* at 59.

advanced to compel disclosure of information found to be protected by a claim of privilege. However, because of the broad sweep of the privilege, the Supreme Court has made clear that “it is not to be lightly invoked.” Thus, the privilege may not be used to shield any material not strictly necessary to prevent injury to national security . . . .<sup>107</sup>

*Ellsberg* illustrates the evolution of the state secrets privilege. The *Ellsberg* court did not advocate for conducting a balancing test of the competing interests involved under *Reynolds*.<sup>108</sup> Rather, the court stated that no competing private or public interest could ever force the Government to disclose information when the Government properly invokes the state secrets privilege. In this regard, it seems that the *Ellsberg* court found that the Government, at the agency head level, should be the final arbiter of whether to uphold the invocation of the state secrets privilege. Accordingly, under a strict interpretation of *Ellsberg*, the Executive unilaterally controls the release of information in court, not the Judiciary.

In summary, the state secrets privilege is a rule of evidence with its origins in common law, used by the Government to prevent the disclosure of certain national security matters in a judicial forum. Two general principles interpreting the state secrets privilege have developed. The first is that certain cases are not to be adjudicated by the Judiciary. These types of cases involve classified agreements between the Government and other covert or secret entities where the disclosure of the agreement or program could potentially compromise national security.<sup>109</sup> The second principle is that the Government’s invocation of state secrets privilege can result in the exclusion of key evidence. The privilege is absolute. If plaintiffs cannot establish standing or a prima facie case without this key evidence, the case may not proceed.<sup>110</sup> The next section of this article will examine recent litigation involving NSA

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<sup>107</sup> *Id.* at 57 (citing *United States v. Reynolds*, 345 U.S. 1, 7 (1953)).

<sup>108</sup> *Reynolds*, 345 U.S. at 11 (“Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”).

<sup>109</sup> *Totten v. United States*, 92 U.S. 105, 107 (1876).

<sup>110</sup> *Reynolds*, 345 U.S. at 11; *Halkin v. Helms*, 598 F.2d 1, 7, 10 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 998 (D.C. Cir. 1983).

electronic surveillance where the Government has invoked the state secrets privilege.

### III. Sample of Recent Cases Interpreting the State Secrets Privilege

In December 2005, *The New York Times* published an article regarding the NSA's domestic surveillance of American citizens' telephonic and electronic communications.<sup>111</sup> President George W. Bush acknowledged the existence of some form of a surveillance program on 19 December 2005.<sup>112</sup> After the article and the admission by President Bush, several lawsuits were initiated throughout the country.<sup>113</sup> This section will focus on two of these cases at the district court level, *Hepting v. AT&T*<sup>114</sup> and *NSA v. ACLU*,<sup>115</sup> and will analyze *NSA v. ACLU*<sup>116</sup> at the appellate court level. The opinions of these courts illustrate their different interpretations of the state secrets privilege.

#### A. *Hepting v. AT&T*

In *Hepting v. AT&T*, plaintiffs consisting of civil rights organizations, academics, and individuals allegedly affected by NSA wiretapping activity filed suit in the Northern District of California.<sup>117</sup> The plaintiffs alleged that AT&T collaborated with the NSA to conduct a warrantless surveillance program that monitors the communications of millions of Americans.<sup>118</sup> The plaintiffs' primary complaint centered on

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<sup>111</sup> Risen & Lichtlau, *supra* note 3, at A1.

<sup>112</sup> See President's Radio Address, *supra* note 5. The President explained he authorized the NSA to intercept communications for which there were "reasonable grounds to believe that the communication originated or terminated outside the United States, and a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates." *Id.*

<sup>113</sup> See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006); *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006); *Hepting v. AT&T, Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006); *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

<sup>114</sup> *Hepting*, 439 F. Supp. 2d 974.

<sup>115</sup> *ACLU*, 438 F. Supp. 2d 754.

<sup>116</sup> *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

<sup>117</sup> *Hepting*, 439 F. Supp. 2d. at 978.

<sup>118</sup> *Id.*

First and Fourth Amendment violations as well as Foreign Intelligence Surveillance Act (FISA) violations. Namely, plaintiffs contended that AT&T, acting as an agent of the Government, violated their First and Fourth Amendment rights “by illegally intercepting, disclosing, and divulging and/or using [their] communications,” and violated FISA by “engaging in illegal electronic surveillance of [their] communications under color of law.”<sup>119</sup> The plaintiffs sought certification of a class action, damages, and injunctive relief.<sup>120</sup>

The Government intervened and moved for dismissal, asserting the state secrets privilege.<sup>121</sup> As is procedurally required by the *Reynolds* holding, John Negroponce and Keith Alexander, who were at that time directors of the agencies invoking the privilege (National Intelligence and National Security, respectively), filed affidavits of support.<sup>122</sup> Relying on *Reynolds*, *Halkin*, and *Halkin II*, the Government advocated three reasons for dismissal of the action or an award of summary judgment for AT&T under the state secrets privilege: “(1) the very subject matter of [the] case is a state secret; (2) plaintiffs cannot make a prima facie case for their claim without classified evidence; and (3) the privilege effectively deprives AT&T of information necessary to raise valid defenses.”<sup>123</sup> In addition, because the case concerned a classified agreement between AT&T and the Government, the Government also argued that it qualified for dismissal under *Totten v. United States*.<sup>124</sup>

The district court ruled against the Government. The court noted that the press had reported on the NSA terrorist surveillance program and both the President and the Attorney General had, at least in part, confirmed its existence.<sup>125</sup> Further, the court noted that AT&T had been providing some ambiguous statements regarding the program such as, “when the government asks for our help in protecting national security, and the request is within the law, we will provide that assistance.”<sup>126</sup> Based on the press leaks, Executive confirmation regarding those leaks, and AT&T’s public statements, the court held that AT&T was not secretly involved in a terrorist surveillance program. In fact, the court

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 979.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 985.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 992–93.

<sup>126</sup> *Id.* at 992.

stated that AT&T's involvement was fairly well-known.<sup>127</sup> Therefore, the court held there was no secret agreement between the Government and AT&T, and hence the *Totten* precedent was inapplicable.<sup>128</sup>

The court next addressed the underlying state secrets privilege. The court stated,

[N]o case dismissed because its “very subject matter” was a state secret involved ongoing, widespread violations of individual constitutional rights, as plaintiffs allege here. Indeed, most cases in which the “very subject matter” was a state secret involved classified details about either a highly technical invention or a covert espionage relationship.<sup>129</sup>

In rendering this interpretation, the court neither directly addressed nor applied the past precedents of *Halkin*,<sup>130</sup> *Halkin II*,<sup>131</sup> or *Ellsberg*.<sup>132</sup> As discussed in the previous section, in these cases the state secrets privilege denied aggrieved plaintiffs standing in litigation involving NSA surveillance programs.<sup>133</sup> Instead, the *Hepting* court attempted to distinguish these cases by stating that each district court allowed some discovery to proceed before the appellate courts ultimately dismissed the cases on state secrets grounds.<sup>134</sup> Therefore, the court reasoned it was premature to determine that the Government's use of the state secrets privilege would preclude the plaintiffs from the evidence necessary to prove a prima facie case.<sup>135</sup>

However, in making this determination the court failed to address the underlying reason the D.C. Circuit dismissed the plaintiffs' claims in *Halkin*, *Halkin II*, and *Ellsberg*. Namely, the Government's invocation of the state secrets privilege in these cases made it impossible for plaintiffs to illustrate they had standing to be able to prove a prima facie case involving any NSA wiretapping activities. The factual predicate in

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<sup>127</sup> *Id.* at 993.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Halkin v. Helms*, 598 F.2d 1, 12 (D.C. Cir. 1978).

<sup>131</sup> *Halkin II*, 690 F.2d 977, 998 (D.C. Cir. 1983).

<sup>132</sup> *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983).

<sup>133</sup> *See supra* Part II.F.–H.

<sup>134</sup> *Hepting*, 439 F. Supp. 2d at 994.

<sup>135</sup> *Id.*

these cases was exactly the same as the factual predicate in *Hepting*, so it seems to have been judicially inefficient for the court to allow the case to proceed based upon past appellate precedent.

Nevertheless, the court did not squarely address this issue, but instead moved on to analyzing whether the state secrets privilege was applicable. The court stated, “[t]he very subject matter of this action is hardly a secret” because “public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program.”<sup>136</sup> For this reason, the court held the facts of this case were also distinguishable from *El-Masri v. Tenet*, a lawsuit where the Government successfully utilized the state secrets privilege regarding its alleged “extraordinary rendition program.”<sup>137</sup>

The *Hepting* court stated that there were only minor leaks of the *El-Masri* program, as compared to *Hepting* case where the leaks were extensive.<sup>138</sup> Further, the court stated that the plaintiff’s objective in *El-Masri* was to reveal classified information pertaining to “the means and methods the foreign intelligence services of this and other countries used to carry out the program.”<sup>139</sup> In contrast, the court stated it would narrow the focus of litigation under its review to the issue of “whether AT&T intercepted and disclosed communications or communication records to the government.”<sup>140</sup> Again the court’s logic was somewhat stretched, as further discovery into how AT&T assists the NSA would presumably disclose the specific means and methods of target identification and exploitation of the foreign surveillance program. The disclosure of this type of information is exactly what the state secrets privilege is supposed to prevent. Nevertheless, the court stated that because “significant amounts of information about the Government’s monitoring of communication content and AT&T’s intelligence relationship with the Government are already non-classified or in the public record,” the current litigation did not immediately qualify for dismissal under the state secrets privilege.<sup>141</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

<sup>138</sup> *Hepting*, 439 F. Supp. 2d at 994–95.

<sup>139</sup> *Id.* at 994 (quoting *El-Masri*, 437 F. Supp. 2d 530).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

The court concluded that its present ruling did not confirm the constitutional and statutory violations in the plaintiffs' complaint.<sup>142</sup> The court also noted that legislative or other judicial developments might directly affect its adjudication of the case.<sup>143</sup> However, the court, referencing *Hamdi v. Rumsfeld*,<sup>144</sup> asserted it had the constitutional duty to adjudicate matters brought forth, stating:

[I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired.<sup>145</sup>

The court proceeded to certify its denial of the Government's motion to dismiss for interlocutory appeal to the Ninth Circuit.<sup>146</sup>

#### B. *American Civil Liberties Union v. National Security Agency*

*ACLU v. NSA* involved a suit filed in U.S. District Court for the Eastern District of Michigan. The plaintiffs in this case were lawyers,

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<sup>142</sup> *Id.* at 994–95.

The existence of this alleged program and AT&T's involvement, if any, remain far from clear . . . it is certainly possible that AT&T might be entitled to summary judgment at some point if the court finds that the state secrets privilege blocks certain items of evidence that are essential to plaintiffs' prima facie case or AT&T's defense.

*Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).

<sup>145</sup> *Hepting*, 439 F. Supp. 2d. at 995 (citation omitted).

<sup>146</sup> *Id.* at 1011 (“[T]he state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion.”).

journalists, academics, and civil rights organizations asserting various constitutional and statutory violations against the NSA.<sup>147</sup>

The litigated issues involved substantially the same warrantless surveillance program as *Hepting*. The plaintiffs' complaint asserted that members of their collective group were in contact with individuals overseas whom the Government could reasonably believe have an affiliation with a terrorist group, namely, Al Qaeda.<sup>148</sup> Thus, the plaintiffs alleged they had a well-founded belief that the Government could potentially intercept their electronic communications under the NSA's terrorist surveillance program.<sup>149</sup> Accordingly, the plaintiffs argued that they were unable to communicate openly with their sources, clients, or research assistants. In essence, plaintiffs alleged that the NSA's terrorist surveillance program caused "a chilling effect" on their Fourth Amendment right to privacy because the NSA was not adhering to FISA's minimization or warrant requirements.<sup>150</sup>

The Government filed a motion to dismiss or for summary judgment under the same underlying rationale as *Hepting*. The Government argued for a *Totten* bar ruling from the court that would essentially estop the court from adjudicating the case.<sup>151</sup> In accordance with this theory, the Government argued that the state secrets privilege prohibits further litigation on the constitutionality of the NSA program because the "very

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<sup>147</sup> *ACLU v. NSA*, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006), *vacated*, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468);

Plaintiffs have alleged that the TSP violates their free speech and associational rights, as guaranteed by the First Amendment of the United States Constitution; their privacy rights, as guaranteed by the Fourth Amendment of the United States Constitution; the principle of the Separation of Powers because the TSP has been authorized by the President in excess of his Executive Power under Article II of the United States Constitution, and that it specifically violates the statutory limitations placed upon such interceptions by the Congress in FISA because it is conducted without observation of any of the procedures required by law, either statutory or Constitutional.

*Id.*

<sup>148</sup> *Id.* at 767–68.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 758–59.



subject matter” of the lawsuit is a state secret involving government relationships with private entities.<sup>152</sup>

Additionally, the Government argued that the state secrets privilege prevented adjudication of the plaintiffs’ claims because the plaintiffs could not prove a prima facie case without the use of state secrets. As such, the plaintiffs did not have standing.<sup>153</sup> Further, the Government asserted it would be unable to present defenses to the lawfulness of any NSA surveillance program because of the state secrets privilege.<sup>154</sup> Finally, the Government argued that the court should not adjudicate the constitutionality of the case based only on the information acknowledged by the Executive regarding the terrorist surveillance program, stating, “[t]o decide this case on the scant record offered by Plaintiffs, and to consider the extraordinary measure of enjoining the intelligence tools authorized by the President to detect a foreign terrorist threat on that record, would be profoundly inappropriate.”<sup>155</sup>

In August 2006, the district court issued an opinion holding that it could conduct a judicial review of the plaintiffs’ claim.<sup>156</sup> In a literal interpretation of *Totten*, the court stated there was no covert espionage relationship between the Government and plaintiffs.<sup>157</sup> Accordingly, the court found no merit in the Government’s assertion that the underlying facts of the case involved secret matters that should not be subject to judicial review under *Totten*.<sup>158</sup>

The court then acknowledged that it had reviewed Government materials ex parte, in camera regarding whether the state secrets privilege should apply in this case.<sup>159</sup> In reviewing the materials, the court held

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<sup>152</sup> *Id.* at 763–64.

<sup>153</sup> *Id.* at 764.

<sup>154</sup> *Id.*

<sup>155</sup> Memorandum of Points and Authorities in Support of the United States’ Assertion of the Military and State Secrets Privilege; Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants’ Motion to Stay Consideration of Plaintiffs’ Motion for Summary Judgment at 49, *ACLU v. NSA*, 438 F. Supp. 2d 754, vacated, *ACLU v. NSA*, 438 F.3d 644 (6th Cir. 2007), petition for cert. denied, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

<sup>156</sup> *ACLU*, 438 F. Supp. 2d at 765–66.

<sup>157</sup> *Id.* at 763–64. Obviously, the Government did not have a covert relationship with the ACLU, but the *Totten* bar could have been applied if the court had found that further exposure of the program itself could compromise national security. *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 765.

that the state secrets privilege was applicable because “a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments.”<sup>160</sup>

However, the court found that the plaintiffs did not need state secrets-privileged information to establish standing in the litigation before the court. Rather, the court found that the basis for plaintiffs’ claims regarding NSA electronic surveillance was dependent entirely on what the Government had previously publicly admitted.<sup>161</sup> The court found that these admissions, without any further discovery, were sufficient for plaintiffs to prove their prima facie statutory and constitutional violation claims.<sup>162</sup> In this manner, the court was able to distinguish *Halkin* and *Halkin II*, where the Government successfully invoked the state secrets privilege in an electronic surveillance case preventing plaintiffs from receiving additional discovery to illustrate standing.<sup>163</sup> In the case at hand, the district court held there was no need for further discovery because the Government’s public disclosures provided the plaintiffs standing and proved the Government committed statutory and constitutional violations.<sup>164</sup>

Yet, the district court, similar to the court in *Hepting*, failed to analyze the purpose of the discovery requests in *Halkin* and *Halkin II*. Namely, the plaintiffs in these cases were attempting to demonstrate that the NSA had specifically targeted them. With the Government withholding this requested information under the auspices of a properly invoked state secrets privilege, the D.C. Circuit Court held that the plaintiffs lacked standing to litigate their suit.<sup>165</sup> The factual scenario presented in *Halkin* and *Halkin II* was very similar to that before the *ACLU* district court.

Nonetheless, after finding the plaintiffs had standing to litigate the claim, the district court analyzed the public admissions of the

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<sup>160</sup> *Id.* at 764 (quoting *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004)).

<sup>161</sup> *Id.* at 765–66.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 764.

<sup>164</sup> *Id.*

<sup>165</sup> *See Halkin v. Helms*, 598 F.2d 1, 10 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 988 (D.C. Cir. 1983).

Government regarding the NSA's warrantless terrorist surveillance program.

It is undisputed that Defendants have publicly admitted to the following: (1) the TSP [terrorist surveillance program] exists; (2) it operates without warrants; (3) it targets communications where one party to the communication is outside the United States, and the government has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.<sup>166</sup>

The court held that because the Government had confirmed the veracity of a terrorist surveillance program, the state secrets privilege did not apply to this "public" information.<sup>167</sup>

Accordingly, the court held that the plaintiffs were able to establish a prima facie case based solely on the Government's previous public admissions regarding its electronic surveillance of overseas communications.<sup>168</sup> The court then stated that the monitoring of plaintiffs' communications to overseas contacts caused real and concrete harm in "that they are stifled in their ability to vigorously conduct research, interact with sources, talk with clients and, in the case of the attorney Plaintiffs, uphold their oath of providing effective and ethical representation of their clients."<sup>169</sup>

Finally, the court provided a cursory analysis of the constitutional and statutory aspects of the Government terrorist surveillance program. In doing so, it found violations of the First and Fourth Amendment as well as the Separation of Powers doctrine and FISA.<sup>170</sup> Based upon these

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<sup>166</sup> *ACLU*, 438 F. Supp. 2d at 764–65.

<sup>167</sup> *Id.* at 766.

<sup>168</sup> *Id.* at 765.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 775–79. Without conducting a comprehensive analysis of the Government's terrorist surveillance program, the court found that the Government's wiretapping or electronic surveillance did not meet FISA's probable cause standard or warrant requirement. Based upon the Government not complying with FISA warrant requirement, the court found it had violated the Fourth Amendment. Further, with an even more cursory analysis, the court found that the TSP caused a chilling effect on plaintiffs' speech in violation of the First Amendment. Finally, the court found that

violations, the court issued a permanent injunction against NSA's conducting any further surveillance under the auspices of a terrorist surveillance program.<sup>171</sup> The Government immediately appealed the ruling and injunction to the Sixth Circuit Court of Appeals. The Sixth Circuit stayed the permanent injunction pending its ruling on the appeal.<sup>172</sup>

### C. Sixth Circuit Appeal of *ACLU v. NSA*

In July 2007, the Sixth Circuit found that none of the plaintiffs had standing to bring claims against the NSA.<sup>173</sup> Additionally, the court held that because of the state secrets privilege, none of the plaintiffs would ever be able to demonstrate that they had standing.<sup>174</sup> Accordingly, the court vacated the district court's holding and remanded the case for dismissal.<sup>175</sup>

The court held that even if NSA had conducted, or was conducting, surveillance without FISA warrants on international telephone and email communication of a party who may have Al Qaeda ties, plaintiffs had no standing to challenge the illegality or constitutionality of the Government's actions.<sup>176</sup> The court stated,

[P]laintiffs do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the [Terrorist Surveillance Program] or without warrants. Instead, they assert a mere belief, which they contend is reasonable and which they label a “well founded belief,” that: their overseas contacts are the types of people targeted by the NSA; the plaintiffs are consequently subjected to the NSA's eavesdropping;

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because Congress had expressly enacted a statute to address foreign electronic surveillance and the Executive had unilaterally decided to ignore or violate these provisions in the statute, its actions were also in violation of the Separation of Powers doctrine. *Id.*

<sup>171</sup> *Id.* at 782.

<sup>172</sup> *ACLU v. NSA*, 467 F.3d 590, 591 (6th Cir. 2006).

<sup>173</sup> *ACLU v. NSA*, 493 F.3d 644, 648 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

<sup>174</sup> *Id.* at 653.

<sup>175</sup> *Id.* at 648.

<sup>176</sup> *Id.* at 653.

the eavesdropping leads the NSA to discover (and possibly disclose) private or privileged information; and the mere possibility of such discovery (or disclosure) has injured them in three particular ways.<sup>177</sup>

The Sixth Circuit then took strong exception to the lower court's rationale that unless it found standing for these plaintiffs, there would be no judicial review of the Executive's actions, and plaintiffs would have no other effective means of redress.<sup>178</sup> The Sixth Circuit stated that the lower court's reasoning was flawed based upon applicable Supreme Court precedent, stating, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."<sup>179</sup>

The court then reiterated that the Judiciary was not the correct venue for plaintiffs' claims when the plaintiffs did not, because of the Government's proper invocation of the state secrets privilege, have the requisite standing to pursue litigation. The court stated, "it, not unlike the President, has constitutional limits of its own and, despite any important constitutional questions at stake, cannot exceed its allotted authority to adjudicate matters when it does not have jurisdiction to do so."<sup>180</sup> The court stated the political process or congressional action was the appropriate venue to address plaintiffs' claims. Quoting the Supreme Court in *United States v. Richardson*, the court stated,

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 675–76.

[I]f [this court] were to deny standing based on the unsubstantiated minor distinctions drawn by Defendants, the President's actions in warrantless wiretapping, in contravention of FISA, Title III, and the First and Fourth Amendments, would be immunized from judicial scrutiny. It was never the intent of the Framers to give the President such unfettered control . . . .

*Id.* (quoting *ACLU v. NSA*, 438 F. Supp. 2d 754, 771 (E.D. Mich. 2006), *vacated*, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468)).

<sup>179</sup> *Id.* at 675 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

<sup>180</sup> *Id.* at 676 ("our standing doctrine is rooted in separation-of-powers concerns" (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 125 (1998) (noting Article III standing limitations "confine federal courts to a role consistent with a system of separated powers"))).

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the national government by means of lawsuits in federal courts. The Constitution created a *representative* government with the representatives directly responsible to their constituents . . . ; that the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the “ground rules” established by the Congress . . . . Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.<sup>181</sup>

#### D. Recent Litigation Summary

The differing opinions interpreting the state secrets privilege illustrate the conflicting pressures on the Judiciary. The district courts in *Hepting* and *ACLU v. NSA* found that plaintiffs have standing in suits initiated before them.<sup>182</sup> These courts demonstrate a more proactive form of judicial oversight in addressing potential constitutional issues, even

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<sup>181</sup> *Id.* (quoting *United States v. Richardson*, 418 U.S. 166, 179 (1974)).

<sup>182</sup> *Hepting v. AT&T, Corp.*, 439 F. Supp. 2d 974, 994–95 (N.D. Cal. 2006); *ACLU v. NSA*, 438 F. Supp. 2d 754, 764 (E.D. Mich. 2006), *vacated*, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

stretching the judicial principle of *stare decisis* to provide plaintiffs with such standing.

On the other hand, the appellate courts in *Halkin*, *Halkin II*, and *ACLU v. NSA* illustrate deference to Executive decision-making in national security cases.<sup>183</sup> In these courts, when the Executive properly invoked the state secrets privilege, they found that plaintiffs did not have standing to litigate if the privilege prevented plaintiffs from proving a *prima facie* case. However, these courts' deference to Executive invocation of the state secrets privilege risks plaintiffs not having any effective recourse for the Executive's potential unlawful or unconstitutional actions. Obviously, there is some merit to both positions taken by the different courts. The dilemma is striking the appropriate balance between national security and safeguarding constitutional freedoms.

In July 2008, President Bush signed the FISA Amendment Act of 2008.<sup>184</sup> This Act did not address the legality of the Government's assertion of the state secrets privilege in the terrorist surveillance program litigation. Instead, the statute provided immunity for telecommunication companies that took part in the terrorist surveillance program from 11 September 2001 to 17 January 2007.<sup>185</sup> The Act prohibits any civil action against phone companies that provided surveillance assistance to the government so long as the assistance was provided pursuant to a FISA order or was in connection with an intelligence activity authorized by the President designed to prevent a terrorist attack against the United States.<sup>186</sup> In current litigation such as *Hepting*, the Government will likely acknowledge that such authorization was provided to the telephone companies. This should result in the ultimate dismissal of claims against the telecommunication companies that assisted the Government with the terrorist surveillance program. However, because the Supreme Court has opted not to grant certiorari on the issue of whether the state secrets privilege denies plaintiffs standing to adjudicate statutory and constitutional claims against the

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<sup>183</sup> *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 988 (D.C. Cir. 1983); *ACLU v. NSA*, 493 F.3d 644, 676 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

<sup>184</sup> FISA Amendments Act of 2008, Pub. L. No. 110-261, § 1018.

<sup>185</sup> *Id.* § 201.

<sup>186</sup> *Id.*

Government,<sup>187</sup> lower courts' interpretation of the state secrets privilege will continue with different courts applying varying degrees of judicial deference or judicial activism. The next section of this article will examine the state secrets privilege in this context.

#### IV. The State Secrets Privilege: Positives, Negatives, and Proposed Changes

The invocation of the state secrets privilege has profound policy implications. The state secrets privilege, as an evidentiary common law privilege, has evolved over the past two hundred years. It has survived for a reason. It makes sense not to endanger national security by litigating cases involving secret operations. However, history has shown us that the Executive can abuse its authority under the auspices of protecting America. Is there a fair compromise? This section will briefly examine some arguments against maintaining the state secrets privilege as currently constituted. Next, this section will respond to those arguments with advocacy for following *Reynolds*, *Halkin*, and *Halkin II* precedents, concluding that the Judiciary should not adjudicate cases where the Government properly invokes the state secrets privilege. However, this section will also propose an alternative course of action that Congress could implement to lessen the opportunity for the Executive to violate American constitutional rights and to ameliorate the harsh results of the state secrets privilege. This course of action involves Congress increasing its oversight responsibilities directly or implementing a special national security court to review and certify Executive state secrets actions prior to Executive implementation of its programs.

##### A. Arguments Against Maintaining the State Secrets Privilege

There are arguments in the academic community that the state secrets privilege, as interpreted by *Reynolds*, *Halkin*, and *Halkin II*, is incompatible with American constitutional principles.<sup>188</sup> The underlying

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<sup>187</sup> *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

<sup>188</sup> *See, e.g.*, Anthony Rapa, Comment, *When Secrecy Threatens Security: Edmonds v. Dep't of Justice and a Proposal to Reform the State Secrets Privilege*, 37 SETON HALL L. REV. 233 (2006); Erin M. Stilp, Comment, *The Military and State Secrets Privilege: The Quietly Expanding Power*, 55 CATH U. L. REV. 831 (2006).



theme of these arguments is that the Executive's unilateral control of the state secrets privilege in litigation unfairly increases the Executive's power over the Judiciary. In other words, the Executive's use of the state secrets privilege infringes on a court's ability to have effective oversight over the government's potential constitutional and statutory violations.<sup>189</sup> This section will examine this argument in the context of current wiretapping litigation involving the state secrets privilege. The subsequent section will attempt to counter these arguments and advocate the continued use of the state secrets privilege.

### *1. Executive Control Infringing Separation of Power Principles*

The *Hepting* and *ACLU v. NSA* district court rulings both illustrate the Executive's power to control evidence through the state secrets privilege. In these cases, the Government moved for dismissal because information released in a judicial forum on a terrorist surveillance program could potentially jeopardize national security.<sup>190</sup> In each of the cases, the respective district courts upheld the privilege to any portion of the program not made public. However, the courts denied the privilege to portions of the program the Government had previously acknowledged publicly.<sup>191</sup> Thus, the Government could not successfully assert the state secrets privilege only because of its repeated previous public disclosures regarding the program.

In the future, the Government could limit all litigation by avoiding public comment or acknowledgement of any "secret" program. In this vein, the Executive could control the admissibility of evidence in court, even if there had been a previous leak of the matter to the public and the program is no longer a secret. Academics argue that this is nonsensical because the purpose of the state secrets privilege is to protect government secrets which, if made public, could compromise national security.<sup>192</sup> Obviously, a leaked program is no longer a "secret"

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<sup>189</sup> See Perkins, *supra* note 20, at 236.

<sup>190</sup> *Hepting v. AT&T, Corp.*, 439 F. Supp. 2d 974, 979 (N.D. Cal. 2006); *ACLU*, 438 F. Supp. 2d at 758.

<sup>191</sup> *Hepting*, 439 F. Supp. 2d at 995; *ACLU*, 438 F. Supp. 2d at 764.

<sup>192</sup> See Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745, 760 (1991) ("The secrecy attached to many national security issues allows the government to invoke national security claims in order to cover up embarrassment, incompetence, corruption or outright violation of law . . . and subsequent events almost always demonstrate that the asserted dangers to national security have been grossly

program, even without the Government's public acknowledgement. Thus, if the facts of the program are already known, the validity of the Government's argument that it must invoke the state secrets privilege to block the release of information in a judicial forum for national security reasons is dubious at best. The counter to this argument is that even if the information the Government is trying to protect from disclosure seems to be insignificant and no longer secret, this information still could be potentially damaging if it led to other information that a "sophisticated intelligence analyst" could piece together to the detriment of national security.<sup>193</sup>

However, the larger issue pertains to separation of power principles. Academics argue that when the Executive unilaterally controls the ability of courts to adjudicate constitutional and statutory violations, the Executive has, and will continue to, assert the state secrets privilege for its own benefit.<sup>194</sup> Accordingly, if the Judiciary gives broad deference to the Government's invocation of the state secrets privilege, the Executive can potentially commit statutory and constitutional violations without any consequence or remedy for an aggrieved plaintiff. Undeniably, the practical result of the state secrets privilege is that broad ranges of Executive action are beyond a court's reach to adjudicate. Precisely for this reason, the state secrets privilege has been the subject of such vociferous academic criticism. In this vein, one commentator asserts that the state secrets privilege is "an unnecessary . . . doctrine that is incoherent, contradictory, and tilted away from the rights of private citizens and fair procedures and supportive of arbitrary executive

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exaggerated.") (quoting Thomas Emerson, *National Security and Civil Liberties*, in *THE FIRST AMENDMENT AND NATIONAL SECURITY* 84-85 (1984)).

<sup>193</sup> See *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978). The court noted that even seemingly trivial matters can be privileged if they are part of a "mosaic . . . that can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate." *Id.*

<sup>194</sup> See *Perkins*, *supra* note 20, at 257.

If the executive is engaged in illegal activity, it violates the principle of separation of powers to allow the executive to control what is admitted into evidence in the trial adjudicating that same activity. By refusing to admit evidence of such activity unless it is officially acknowledged by the very party with an interest in excluding it, the [state secrets] rule gives the executive this undue control, albeit indirectly.

*Id.*

power.”<sup>195</sup> Further, the same commentator states that complete deference by the Judiciary to the Executive invocation of the state secrets privilege is constitutionally suspect.

The framers adopted separation of powers and checks and balances because they did not trust human nature and feared concentrated power. To defer to agency claims about privileged documents and state secrets is to abandon the independence that the Constitution vests in Congress and the courts, placing in jeopardy the individual liberties that depend on institutional checks.<sup>196</sup>

Another commentator argues that Congress has provided the Judiciary specific authority to adjudicate cases when the Executive asserts the state secrets privilege by enacting 28 U.S.C. § 1331,<sup>197</sup> and by enacting specific statutory limitations in the areas of national security such as FISA.<sup>198</sup> Accordingly, this commentator argues that if the Judiciary dismisses cases when the Executive claims the state secrets privilege, the Judiciary is abdicating its congressionally assigned responsibility to restrain Executive power and is equally culpable in not remedying the Government’s actions.<sup>199</sup>

## 2. Lack of Oversight

Academics also take issue with *Halkin* and *Halkin II*, and presumably the Sixth Circuit’s holding in *ACLU v. NSA*, that aggrieved plaintiffs without standing to bring suit against the Government have no other recourse, save through Congress or the political process.<sup>200</sup> They feel that when the Executive violates the constitutional rights of unpopular individuals, such as individuals who may be in contact with

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<sup>195</sup> LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 258 (2006).

<sup>196</sup> *Id.* at 262.

<sup>197</sup> 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

<sup>198</sup> See Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1954–55 (2007).

<sup>199</sup> *Id.* at 1955.

<sup>200</sup> See FISHER, *supra* note 195, at 258 (“Broad deference by the courts to the Executive Branch, allowing an official to determine what documents are privileged, undermines the judiciary’s duty to assure fairness in the courtroom and to decide what evidence may be introduced.”).

suspected terrorists, these individuals cannot reasonably look to Congress for a remedy because Congress has little political incentive to help these types of constituents.<sup>201</sup> Yet the invocation of the state secrets privilege and rulings such as *ACLU v. NSA* declare that is their only recourse.<sup>202</sup> Further, these academics believe Congress does not have a positive history of proactively helping individuals whose constitutional rights may be abridged.<sup>203</sup> On the other hand, the implication is that the Judiciary has consistently taken stands against a majority to protect constitutional principles.<sup>204</sup>

#### B. Upholding the State Secrets Privilege

In addressing the aforementioned arguments against the state secrets privilege, this section advocates for continued judicial deference when the Executive invokes the state secrets privilege. The purpose of the state secrets privilege is to protect the disclosure of information that should remain secret in order to ensure an effective implementation of foreign policy and protection of national security. The Executive is the branch with the institutional knowledge to determine what information could potentially damage this nation's national security. Thus, the Executive, not the Judiciary, is in the best position to determine whether to invoke the state secrets privilege to protect sources, methods, and means of intelligence gathering and exploitation to protect this nation.<sup>205</sup>

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<sup>201</sup> See Perkins, *supra* note 20, at 257–59.

<sup>202</sup> *ACLU v. NSA*, 493 F.3d 644, 676 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468) (citing *United States v. Richardson*, 418 U.S. 166, 179 (1974)).

<sup>203</sup> See Perkins, *supra* note 20, at 258 (“An elected legislature will often abdicate its responsibility to protect the minority because of its political interest in the majority’s approval. This was well understood by the Founders and a fundamental reason behind their creation of a strong and independent judiciary.”).

<sup>204</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1953). This case held that separate educational facilities are inherently unequal. As a result, de jure racial segregation was ruled a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Id.* at 495.

<sup>205</sup> See *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 988 (D.C. Cir. 1983).

*1. Separation of Powers is Effective*

It is true that plaintiffs may be unable to establish standing to prove a prima facie case when the Government properly invokes the state secrets privilege. At first blush, this can appear to be a draconian result, especially if plaintiffs are alleging constitutional misconduct. However, to invoke the privilege, the Agency head must have determined that releasing the information in a public judicial forum could compromise national security.<sup>206</sup> In this type of case, the needs of the nation take precedence over the needs of an individual. In our elected democracy, political leaders who appoint Agency heads are accountable for their actions. If the electorate finds its leaders to be arbitrarily invoking the state secrets privilege, they can vote the political leadership from office, demand that Congress take further oversight action, provide electorate pressure on Congress to enact new legislation, or demand that Congress withdraw funds for suspect Executive programs. Further, if the Executive is egregiously violating the law, Congress could contemplate impeachment proceedings. As the Sixth Circuit stated in *ACLU v. NSA* when it refused to adjudicate constitutional issues in front of the court, “Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [plaintiff’s] views in the political forum or at the polls.”<sup>207</sup>

Additionally, Congress *has* taken an active role in overseeing Executive actions involving the state secrets privilege. During the same time that the D.C. Circuit Court upheld government state secrets privilege in *Halkin* and *Halkin II*, thereby denying plaintiffs standing to litigate their suits, Congress initiated FISA to provide warrant and minimization requirements for national security surveillance operations.<sup>208</sup> Shortly thereafter, President Reagan enacted Executive Order (EO) 12,333, setting out specific rules on how the Executive was to conduct its intelligence activities with internal oversight and approval mechanisms to ensure utilization of minimal intrusive means when lawfully collecting intelligence information.<sup>209</sup>

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<sup>206</sup> *Reynolds*, 345 U.S. at 7–8.

<sup>207</sup> *ACLU*, 493 F.3d at 676 (quoting *United States v. Richardson*, 418 U.S. 166, 179 (1974)).

<sup>208</sup> The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1871 (2000).

<sup>209</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), *reprinted in* 50 U.S.C. § 401 (2000).

In the present, after the leaked disclosures and subsequent Government confirmation of the NSA terrorist surveillance program, aggrieved plaintiffs initiated suit in federal district courts.<sup>210</sup> The Government's lack of compliance with FISA and the Fourth Amendment was the central complaint of the plaintiffs in these cases.<sup>211</sup> As in *Halkin* and *Halkin II*, the Sixth Circuit in *ACLU v. NSA* dismissed plaintiffs' lawsuit for lack of standing.<sup>212</sup> Yet, the lack of a judicial forum did not prevent Congress or the public from pressuring the Executive to change its surveillance operating procedures to comport with FISA and indirectly comport with the Fourth Amendment.<sup>213</sup> Nor did it prevent Congress from enacting the FISA Amendments Act of 2008 and with it further oversight and minimization procedures.<sup>214</sup> Thus, both *Halkin* and *Halkin II* and the current NSA litigation demonstrate exactly how our separation of powers in government is supposed to operate. The Executive altered its conduct and implemented internal regulations, without judicial intervention, based upon congressional statutory activity, congressional oversight, and electorate pressures. There was no need for judicial activism violating the separation of powers, or for a court to disregard *stare decisis* to find plaintiffs' standing, or for a court to absolve the state secrets common law privilege, as the system of checks and balances functioned correctly.

However, a logical counterargument against this position is that the Executive committed constitutional and statutory surveillance violations in the 1970s and thirty years later committed the same type of violations with its terrorist surveillance program. Thus, this line of reasoning asserts that the Executive repeatedly violated the Constitution and applicable statutes without any discernable consequences. However, this argument fails to recognize that even though *Halkin* and *Halkin II* were

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<sup>210</sup> See, e.g., *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), *vacated*, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).

<sup>211</sup> *ACLU*, 438 F. Supp. 2d at 758; *Hepting*, 439 F. Supp. 2d at 978.

<sup>212</sup> *ACLU*, 493 F.3d at 676.

<sup>213</sup> Letter from Attorney Gen. Alberto Gonzales to Chairman of the Comm. on the Judiciary Patrick Leahy (Jan. 17, 2007), *available at* [http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales\\_Letter.pdf](http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf) [hereinafter Gonzales Letter]. According to a letter written by the then-Attorney General, "any electronic surveillance that was occurring as part of the [TSP] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." *Id.*

<sup>214</sup> FISA Amendments Act of 2008, Pub. L. No. 110-261, § 101 (discussed in further detail *infra* Part IV.C).

ultimately dismissed, the Executive changed its conduct without any form of judicial intervention. Instead, Congress fashioned a remedy, specifically FISA minimization procedures, that ensured surveillance applications came under the judicial review of the Foreign Intelligence Surveillance Court (FISC). Contemporaneously, the Executive enacted EO 12,333, thereby ensuring that collection activity on U.S. persons fell within an Agency's purpose under the least intrusive means available. Both FISA and EO 12,333 required that the intelligence community collected information on U.S. persons under very specific circumstances with very specific oversight mechanisms.<sup>215</sup> A court could not have fashioned a better remedy than FISA or EO 12,333 to regulate government surveillance activity. Further, during the last thirty years the Executive has adhered to the statutory limitations and internal regulations regarding surveillance to a much greater degree than during the pre-FISA time period without the need for judicial intervention.<sup>216</sup>

After the Bush Administration relied on its constitutional powers and the authorization for use of military force to initiate the terrorist surveillance program, it targeted "international telephone and email communications in which one of the parties was reasonably suspected of Al Qaeda ties."<sup>217</sup> In this manner, the government did not conduct carte blanche surveillance without any minimization procedures because it was at least trying to operate under the general framework of FISA and EO 12,333. That is to say, the previous statute and the executive order provided a framework for acceptable surveillance activity by the government.<sup>218</sup> Thus, although the terrorist surveillance program focused

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<sup>215</sup> See 50 U.S.C. § 1801 (i) (defining what constitutes a U.S. Person for surveillance); *id.* § 1802 (electronic surveillance of certain foreign powers without a court order upon Attorney General certification); Exec. Order No. 12,333 pts. II & III, 46 Fed. Reg. 59,941 (Dec. 4, 1981), *reprinted in* 50 U.S.C. § 401 (2000) (detailing specific requirements for collection, what type of techniques to be used, approval authorities, and congressional oversight reporting requirements).

<sup>216</sup> See S. REP. NO. 95-604(I), at 7, 1978 U.S.C.C.A.N 3904, 3908. The Senate Judiciary Committee report utilized by the Senate Select Committee to study Government Operations with Respect to Intelligence Activities (Church Committee) conclusively found that every President from Franklin Roosevelt to Richard Nixon had asserted various authorities to conduct warrantless surveillance, at times on extremely dubious targets. *Id.* Compare this period with post-FISA and post-12,333 where the Executive has much more congressional and internal oversight and minimization requirements resulting in more selective and less intrusive targeting of U.S. persons.

<sup>217</sup> *ACLU*, 493 F.3d at 653.

<sup>218</sup> Press Release, White House, President Discusses NSA Surveillance Program, Address at the Diplomatic Reception Room, Wash., D.C. (May 11, 2006). President Bush stated that "[g]overnment's international activities strictly target Al Qaeda . . . [t]he government

on the external terrorist threats that were much more dangerous to national security than those faced in Operations *Minaret* or *Shamrock*, the government purposely minimized its surveillance techniques because of previous statutes and executive orders. Further, when the terrorist surveillance program leaked to the press resulting in several lawsuits, the Executive, faced with further congressional oversight, unilaterally decided to bring the program under FISA review.<sup>219</sup> This illustrates that congressional oversight and congressional action work in reigning in Executive surveillance activities without the need for judicially imposed remedies.

## 2. *National Security Matters Should Be Handled by the Executive*

The Judiciary is not better equipped than the Executive or Congress to handle foreign policy or national security matters. The Judiciary is decentralized, has a time-consuming adjudication process, and lacks expertise in the areas of foreign policy and national security.<sup>220</sup> Conversely, the Executive acts with a unified voice in security-related matters, has a relatively quick decision and implementation process, and possesses the requisite knowledge and expertise in national security

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does not listen to domestic phone calls without court approval . . . (the government) is not mining through the personal lives of millions of Americans." *Id.*

<sup>219</sup> See Gonzales Letter, *supra* note 213.

<sup>220</sup> John Yoo, *Courts at War*, 91 CORNELL L. REV. 573 (2006).

Judicial decisions may harm the national interest because courts cannot control the timing of their proceedings or coordinate their judgments with the actions of the other branches of government. For example, the President might be engaged in a diplomatic campaign to pressure a Middle Eastern country into terminating its support for terrorism at the time that a judicial decision freed a suspected al Qaeda operative. A judicial decision along these lines could undermine the appearance of unified resolve on the part of the United States, or it might suggest to the Middle Eastern country that the executive branch cannot guarantee that it could follow through on its own counterterrorism policies. A court cannot take account of such naked policy considerations in deciding whether a federal statute has been violated or whether to grant relief, while the political branches can constantly modify policy in reaction to ongoing events.

*Id.* at 594.



issues. Most importantly, the Executive has a constitutional responsibility to protect the United States.<sup>221</sup>

There are ninety-four district courts, nine circuit courts, and one Supreme Court.<sup>222</sup> Until appellate courts have adjudicated a matter, each of the district courts can have a differing opinion on a legal issue. This system works well for criminal or civil matters litigated in the respective district courts, as the courts are able to adjudicate matters relatively quickly within their jurisdictions without having to report to a higher authority. However, this decentralized system would be ineffective in adjudicating national security cases involving the invocation of the state secrets privilege. Commentators have argued that our nation's forefathers framed the Constitution specifically to ensure that our government speaks with one voice in the context of foreign relations.<sup>223</sup> Indeed, the district court's ruling in *ACLU v. NSA*, enjoining the NSA from conducting further terrorist electronic surveillance, aptly demonstrates the danger of allowing courts to adjudicate foreign policy matters.<sup>224</sup> If the state secrets privilege were eliminated, cases involving legitimate government security programs such as the terrorist surveillance program could be subject to lengthy and arbitrary litigation in multiple district courts. Without the privilege, it would be very difficult for our intelligence community to engage in secret operations. This would have profound national security ramifications as government intelligence could be subject to judicial activism.

However, assume for the sake of argument that the Executive is running a secret program that is blatantly unconstitutional and is in violation of applicable statutes, but is important to national security. Assume also that the program originates from this country with support of private corporations, but also receives technical support from other countries such as Pakistan and India. Further, the program receives

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<sup>221</sup> See U.S. CONST. art. II, § 2 ("The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . ."); see also *id.* art. II, § 1 (stating the President has a fundamental duty to "preserve, protect, and defend the Constitution.").

<sup>222</sup> Understanding the Federal Courts, <http://www.uscourts.gov/UFC99.pdf> (last visited Feb. 2, 2009).

<sup>223</sup> See generally FRED W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 112 (1986) (exploring the origin of the Constitution in the context of foreign affairs during the period preceding the Constitution's inception).

<sup>224</sup> *ACLU v. NSA*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006), *vacated*, *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *petition for cert. denied*, 76 U.S.L.W. 2438 (U.S. Feb. 19, 2008) (No. 07-468).

unofficial support from operatives in Iran and Saudi Arabia who secretly route information originating from those countries to the American government.

If this program were to be fully exposed in a judicial forum it likely would cause major diplomatic issues, damage national security through the exposure of methods, means, and sources, and jeopardize foreign country operatives. It would also risk the possibility of private industries failing to cooperate with the government in future operations to thwart national security threats. Under these circumstances, it seems reasonable that a court would uphold the Government's assertion of the state secrets privilege.

However, certain federal district courts, such as the district court in *ACLU v. NSA*,<sup>225</sup> may view the unconstitutional nature of these actions as a reason to deny the Government use of the state secrets privilege. This would be very problematic to national security for the aforementioned reasons. Yet, the government would be violating the Constitution and various statutes in running this program, so should there not be some form of redress? Some academics have argued that in this circumstance, the Government should allow the suit to proceed, or settle plaintiff's complaints, rather than simply receiving the benefit of having the complaint dismissed.<sup>226</sup> This procedure would allow the Government, not the plaintiff, to bear the costs of maintaining secrecy. However, this approach would likely cause a dramatic increase in frivolous lawsuits and would not address the primary motive in state secrets privilege litigation: forcing the Government to cease its alleged unconstitutional behavior.<sup>227</sup> Hence, this option seems to be suspect. Instead, this article argues for another form of oversight to ameliorate the situation where the Government invokes the state secrets privilege, causing the plaintiff's constitutional claims go unaddressed.

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<sup>225</sup> *Id.*

<sup>226</sup> See FISHER, *supra* note 195, at 212, 245.

<sup>227</sup> See Robert Chesney, *Symposium on the New Face of Armed Conflict: Enemy Combatants After Hamdan v. Rumsfeld: State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1309–11 (2007).

### C. Additional Oversight Proposal

In state secrets privilege cases such as *Halkin*, *Halkin II*, and *ACLU v. NSA*, it appears the Executive only initiated changes to its questionable intelligence activities after exposure in the press and courts. Similarly, in these cases, Congress only increased its oversight responsibilities and enacted new legislation after the Executive committed its alleged statutory or constitutional violations.<sup>228</sup> In this sense, it appears the Executive was operating *ultra vires*, outside of the statutory framework Congress had created, and only changed its behavior when caught. Accordingly, there should be some mechanism in place to prevent this type of Executive conduct from occurring in the first place, thus foreclosing the need for litigation.

As *Halkin*, *Halkin II*, and *Reynolds* held, courts must grant substantial deference to Executive decisions regarding the release of information that might reasonably harm national security.<sup>229</sup> However, absolute deference to Executive decisions in national security, without any form of review, may allow the Executive to commit constitutional or statutory violations in the name of national security. Operations *Minaret* and *Shamrock*, and possibly the terrorist surveillance program, illustrate this point. In an attempt to address some of the issues of the terrorist surveillance program, Congress enacted the FISA Amendments Act of 2008 providing for some additional oversight of the Executive's foreign wiretapping programs.<sup>230</sup> The Act requires the Inspectors General of the Department of Justice, the Office of the National Director of Intelligence, and the National Security Agency to review and report to Congress the intelligence activities involving communications that were authorized at any time between 11 September 2001 and 17 January 2007.<sup>231</sup> There are also provisions in the statute allowing the Inspectors General to review Executive compliance with the targeting and minimization procedures and report this information to select congressional committees.<sup>232</sup>

However, these oversight provisions are by and large addressing retrospective wiretapping issues of the terrorist surveillance program, not

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<sup>228</sup> See *supra* Part IV.B.1.

<sup>229</sup> *United States v. Reynolds*, 345 U.S. 1 (1953); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978); *Halkin II*, 690 F.2d 977, 988 (D.C. Cir. 1983).

<sup>230</sup> FISA Amendments Act of 2008, Pub. L. No. 110-261, § 101.

<sup>231</sup> *Id.* § 101.

<sup>232</sup> *Id.*

prospective issues that are likely to develop in surveillance programs as technology continues to evolve. Accordingly, this article contends that there are more effective oversight procedures available. Namely, there should be a congressional certification of Executive action *prior* to the initiation of an Executive program such as the terrorist surveillance program. This certification process would have the Executive reporting either directly to the congressional intelligence committees or, in the alternative, to a national security court modeled after (or incorporating) the Foreign Intelligence Surveillance Court (FISC) that would certify national security claims.<sup>233</sup> This article asserts that the basic statutory framework is already in place to ensure Executive compliance in conducting intelligence activities. Therefore, only a slight change to existing law would allow Congress to accomplish a certification process ensuring better intelligence oversight of the Executive.

The Intelligence Oversight provision, 50 U.S.C. § 413, states that “[t]he President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity.”<sup>234</sup> The law states that the Executive does not need to have congressional intelligence committee approval to carry out anticipated intelligence activities.<sup>235</sup> However, the Executive must provide information to Congress on the intelligence activity and furnish Congress with all requested material on intelligence operations.<sup>236</sup>

Executive agencies regularly meet with congressional intelligence committees regarding current and past operations. As stated, to prevent the Executive Branch from acting outside of its statutory or constitutional authority requires a simple change to this statute. A section could be added to the law that states that the Executive must inform the congressional intelligence committees regarding any current or future operations where the Executive would assert the state secrets privilege if certain details of the program were leaked and litigation commenced. In essence, this would be a system to ensure the Executive kept Congress fully apprised of its intelligence activities while at the same time allowing Congress to exercise further legal oversight over such activities.

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<sup>233</sup> The Foreign Intelligence Surveillance Court (FISC) was established to review requests (“FISA warrants”) by U.S. agencies for surveillance of foreign targets. *See* 50 U.S.C. §§ 1801–1805 (2000).

<sup>234</sup> 50 U.S.C. § 413(a)(1) (2000).

<sup>235</sup> *Id.* § 413(a)(2).

<sup>236</sup> *Id.* § 413(b).

The Judiciary may not be the proper branch to inquire into the constitutionality of Executive conduct, but Congress would be able to take over that task by enacting this legislation.

To accomplish this oversight responsibility, the Agency head would file an affidavit of support advocating why the state secrets privilege would be necessary for the specific program. The Executive would fully articulate to the congressional committees the parameters and legal justifications for the program. The Committee, by majority vote, would then “certify” the agency as complying with applicable constitutional and statutory standards. If the program were to leak, and a lawsuit were to commence, the Executive’s invocation of the state secrets privilege would still deny plaintiffs standing. However, plaintiffs, the court, and the American public would know that the matter had received previous oversight by both the Executive and Congress. In this regard, there would be no compromise of national security through litigation, but Congress would exercise an extra check on Executive authority in invoking the state secrets privilege.

At least one commentator has suggested a somewhat similar approach. His suggestion is that the Senate and House intelligence committees serve in an advisory role to a judge whenever the Government invokes the state secrets privilege. The committees would then provide input and a vote on whether the privilege should apply to the case at hand. The judge would consider the vote, but it would not bind his decision.<sup>237</sup> Another commentator has suggested that if a court

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<sup>237</sup> See Chesney, *supra* note 227, at 1312.

This suggestion plainly entails a great many practical and legal hurdles . . . . [U]nder this proposal, the judge would have the statutory option of calling for the views of the intelligence committees after having determined that the privilege has been asserted in conformity with the requisite formalities. The committees’ views would not be binding, but would at least provide well-informed advice to the judge without requiring disclosure of information to persons who do not at least arguably have the authority to access it. Of course, one can expect that the committees might divide along partisan lines when faced with such an issue. To avoid that prospect, a recommendation to disallow the privilege should require a supermajority vote.

*Id.*

concludes that the state secrets privilege is applicable, it should send the matter back to Congress for congressional review and action.<sup>238</sup>

If having the Executive report directly to congressional committees proved too onerous, time-consuming, or politically unappetizing, the alternative would be for Congress to set up a National Security Court modeled after the FISC, or perhaps incorporating the FISC itself.<sup>239</sup> A National Security Court would report directly to the congressional intelligence committees on all of its findings. The members of the court could be specifically selected for their expertise regarding classification procedures, right to privacy issues, and national security issues. The court would be in a secure building and serviced with reporters and clerks who hold the requisite security clearances. Similar to a criminal trial involving classified materials, the court could have the services of intelligence and military subject matter experts appointed to advise it with respect to the risk of disclosure of classified materials.

The court would not adjudicate cases after the Government invoked the state secrets privilege. Rather, it would serve as the certification process for Executive action prior to the initiation of an intelligence operation. If the court agreed to the legality of the Executive's actions coupled with the need to keep the program secret, it would issue an opinion to that effect. Currently, the Government can appeal FISC court determinations regarding government FISA warrants to the Foreign Intelligence Surveillance Court of Review and potentially to the Supreme Court.<sup>240</sup> In this same manner, the Government could also appeal National Security Court state secret certifications if necessary.

The congressional intelligence committees would then have access to the opinion and to the relevant federal court if a lawsuit commenced following a security breach. If the Executive ever conducted a program not certified by the security court, it would be statutorily barred from invoking the state secrets privilege in future litigation. The certification process would serve two purposes. First, it would encourage the Executive to examine thoroughly the legality of its programs prior to their initiation. Second, it would ensure that both the Judiciary through

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<sup>238</sup> See Frost, *supra* note 198, at 1958.

<sup>239</sup> See 50 U.S.C. §§ 1801–1805 (2000). The FISC's jurisdiction is currently narrowly focused on approving government warrants regarding foreign intelligence information. FISC hearings are non-adversarial proceedings where the government presents applications to conduct surveillance. *Id.*

<sup>240</sup> *Id.* § 1805c.

the National Security Court and Congress through its intelligence committees have some oversight over Executive activity whenever the government is acting in a constitutionally suspect manner. Other commentators have envisioned a similar National Security Court, but its role would be to adjudicate cases after the Government invoked the state secrets privilege, not to serve in a certification process.<sup>241</sup>

In any event, either a certification process or an adjudication process would present some difficult logistical implementation issues. Additionally, some would argue that the process of Congress certifying Executive action or Congress interacting with the Judiciary comes close to the constitutional line separating judging from legislating. However, any further form of oversight that would allow for additional scrutiny of the Executive's actions regarding its invocation of the state secrets privilege would be a welcome development and should be explored thoroughly.

## V. Conclusion

The state secrets privilege can be a national security savior or a constitutional demon depending on an individual's personal beliefs. In the past, when the Executive has engaged in arguably unlawful or unconstitutional surveillance conduct, the Executive has invoked the state secrets privilege to prevent further disclosure of the specific methods and means of its surveillance activities in a judicial forum. In some instances, this privilege has prevented plaintiffs from establishing standing for the courts to adjudicate their constitutional and statutory

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<sup>241</sup> See Chesney, *supra* note 227, at 1313.

A related but more appealing alternative would be for Congress to take steps to permit suits implicating state secrets to proceed on an in camera basis in some circumstances . . . . Congress might authorize judges who would otherwise be obliged to dismiss a suit on privilege grounds instead to transfer the action to a classified judicial forum for further proceedings. Such a forum—modeled on, or perhaps even consisting of, the Foreign Intelligence Surveillance Court at a minimum would entail Article III judges hearing matters in camera on a permanently sealed, bench-trial basis.

*Id.* Other commentators have suggested a similar National Security Court. See, e.g., BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 165, 171–72 (2008).

claims. In a public policy context, this is a correct result, as the state secrets privilege has the objective of ensuring national security. However, there is both the potential, and the reality, of Executive overreaching in its surveillance activities, justifying its actions in the interests of national security, and then claiming the state secrets privilege in court.

To ameliorate this problem, Congress and the Executive have taken active steps to implement regulations to govern surveillance activities and minimize government surveillance of U.S. persons. However, this article argues that the government lacks an adequate system to prevent the Executive from overreaching in its future intelligence activities. As such, an additional oversight mechanism should be enacted to ensure that the Executive is properly invoking this powerful privilege. This extra check on the Executive would entail the Executive reporting its secret surveillance actions to congressional intelligence committees for certification, or reporting to a special National Security Court modeled after the FISC for certification, prior to initiation of the intelligence program. If the Executive did not certify its program, it could not invoke the state secrets privilege in litigation. This would ensure that the Executive kept Congress fully apprised of its conduct, and would reassure the public that the Executive was not acting unilaterally when invoking the state secrets privilege. This development would strike an appropriate balance between the security needs of the nation and the constitutional rights of the individual for the benefit of all.